No. 82-958

In The
Supreme Court of the United States
October Term, 1983

McDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

vs.

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FREDA GREENWOOD, JOHN G. GREENWOOD, individually; and FREDA GREENWOOD, individually,

Respondents.

REPLY BRIEF OF PETITIONER

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ARGUMENTS AND AUTHORITIES

I. Petitioner's constitutional rights to due process and trial by jury are within the scope of review on certiorari.

Respondents' brief suggests that this Court should ignore the constitutionality *vel non* of the decision of the U. S. Court of Appeals for the Tenth Circuit in this mat-

ter, for the stated reason that constitutional issues were not raised before the Court of Appeals or in the Petition for Certiorari. A review of the record contradicts the assertions of Respondents.

The constitutionality of the rule of law followed in the Tenth Circuit in analyzing questions of alleged juror misconduct during voir dire was not at issue in this case until the opinion of the Court of Appeals was issued on September 3, 1982. Prior to that date no indication had been given that the Court of Appeals would ignore facts appearing in the record or would resort to an irrebuttable presumption, rather than utilizing a rule of reasonable inference based upon all material evidence. Petitioner's response to the opinion of the Court of Appeals was a petition for rehearing focusing upon the arbitrariness and irrationality of the decision rendered by the Court of Appeals. The Petition for Rehearing therefore gave the Court of Appeals an opportunity to assess the constitutional issues raised by its decision, by way of a rehearing. The Petition for Rehearing was of course denied with one dissenting vote on October 4, 1982.

Constitutional issues were directly addressed in the Petition for Certiorari, contrary to the implication of Respondents' brief. Petitioner's contentions concerning the unconstitutionality of the decision rendered by the Court of Appeals were summarized in the Petition for Certiorari at pages 8-9:

> Only the Supreme Court of the United States can maintain discipline over the various Circuit Courts of Appeal. Where a Circuit Court of Appeals oversteps its authority, and usurps the authority of the district court rather than exercising review over that

> court, this Court is required to exercise its powers of supervision. The decision rendered by the Court of Appeals in this Court is without parallel in any other reported decision. *The defendant was entitled to a trial by jury under the provisions of the Seventh Amendment to the United States Constitution.* If the Courts of Appeal are permitted to grant arbitrary indulgences to selected appellants, outside the boundaries of accepted principles of appellate review, jury verdicts will be rendered meaningless. The opportunity for abuse of discretion is vast. If a Court of Appeals were permitted to grant new trials on behalf of favorite appellants without regard to principles of law, and to deny new trials where the verdict favors the party in sympathy, the legal process would be reduced to a game of chance. (Emphasis supplied.)

Respondents' contention on page 23 of his brief on the merits that this issue was not addressed in the Petition for Certiorari therefore results from a failure to read that document.

II. The decision of the Court of Appeals was not based upon stipulated facts.

Respondents' brief continually refers to the facts found by the Court of Appeals as having been "stipulated". There is no evidence anywhere in the record that the facts on which the Court of Appeals based its decision were other than controverted. The findings of the Court of Appeals relate to the materiality of certain comments made by juror Payton, not to the mere fact of Payton's having spoken the described words. The entire conversation, not simply a phrase taken out of context, must form the basis for any factual determination of materiality. The Court of Appeals ignored the most significant portions of the conversation as reported by counsel for

Petitioner, apparently because counsel for Respondents denied that these comments had been made. A factual controversy therefore underlies all of the issues presented on certiorari.

The factual controversy is set out on page 9 of the reply brief of appellant before the Tenth Circuit:

> On page 18 of its brief, defendant states:
>
> Although it is not in the record, defense counsel does recall the conference telephone call with plaintiff's counsel and the juror Payton. Payton did indeed relate the fact that his son received a broken leg late in the summer as the result of an exploding tire rim. His son recovered from the injury in about a month and in time to play for his high school football team in the fall following the late summer in which the accident occurred. He did not regard it as a "severe" injury and as he understood the question did not result in any "disability or prolonged pain and suffering". As far as Mr. Payton is concerned he answered counsel's question honestly, and correctly, by remaining silent. No misconduct surfaced.
>
> This entire problem is amplified and complicated by the fact the trial court refused plaintiff leave to go out to interview jury foreman Payton (where a court reporter could have been present) and denied plaintiff leave to subpoena the jurors to give testimony at the hearing on plaintiff's Motion for a New Trial. Both plaintiff and defendant's counsel are forced to rely upon memory of a brief conversation which took place one and one half years ago. Contrary to defendant's recollection, counsel for plaintiff does not recall that any questions were asked or answers given concerning the description or number of broken bones, that any questions were asked or answers given concerning any return to playing football, and that any questions were asked or answers given concerning

> whether jury foreman Payton regarded the injury as severe or resulted in any disability or prolonged pain and suffering. Counsel for plaintiff felt very constrained by the limited scope of inquiry allowed by the trial court, and the conversation only lasted about two minutes. The conclusion that jury foreman Payton answered counsel's questions honestly and correctly, and that no misconduct surfaced, is that of defendant. What is important about the telephone conference, which was stated in Brief of Appellant, (page 7), and adopted by defendant (Brief of Appellee, page 128), is the attitude of jury foreman Payton that accidents are a part of life and that all his children had been involved in accidents. Mr. Payton's basic stand was that the voir dire questions were dumb questions and made no difference *to him*. However, revelation of jury foreman Payton's attitude would have made a difference to counsel when exercising plaintiff's right of peremptory challenge.

The comments by Respondents' counsel in the above quoted text are highly revealing. Opposing counsel's recollection of the conversation was that it addressed questions outside the scope of the inquiry permitted by the District Court. The permission granted by the trial Judge was specifically limited to a determination of the severity of the injury in question, and whether that injury resulted in disability or prolonged pain and suffering. Counsel for Respondents apparently willfully violated that order by failing to inquire upon that subject, and instead inquiring about the juror's general attitude toward personal injury claims without relation to his son's injury.

This factual controversy also points out the lack of foundation for the Court of Appeals' determination of "materiality". Based on the information presented to the Court of Appeals, it is impossible to determine whether

the fracture in question was hairline or compound, whether it involved hospitalization, or even whether a cast was applied. The comments made by juror Payton, as recalled by counsel for Petitioner, were strongly indicative that the injury was not severe enough to be brought to mind by the questions asked of juror Payton.

According to the arguments set out in Respondents' brief, the materiality of any information revealed by a prospective juror can only be made in context with other answers on the same topic. The fact of injury alone is not indicative of bias for or against either party. According to Respondents' brief, an attitude of complete stoicism or resignation in the face of a crippling injury would be indicative of anti-plaintiff bias while an unwillingness to file a lawsuit over a minor injury would not so indicate. Presumably this was the thought process followed by counsel in response to the revelations of juror Finnigan. That juror indicated that her husband had been involved in a work place accident in which a machine "stripped the back of his hand off". She described the failure to file suit over this incident by saying that the accident "didn't have anything to do with the machine, it was a human error of somebody else". Presumably this sort of attitude is what counsel for Respondents have in mind when they describe the process of exercising peremptory challenges.

Assuming that this is the process ordinarily followed, that process obviously was ignored in the present case. Mrs. Finnigan uttered a classic "bellringer" to use the language of Respondents, and uttered highly pro-defendant comments during follow up questioning, yet Mrs. Fin-

nigan remained on the jury. There can be no conceivable clearer proof that the attitude of jurors toward injuries to members of their families was considered to be immaterial by all parties. The conduct of counsel in response to the so-called "revelations" of juror Payton also speaks louder than any ex post facto rationalization. If the information revealed by juror Payton in his post trial interview had been considered significant by counsel for Respondents that information would have been reported to the District Court before whom the motion for a new trial was pending.

In summary the so-called "stipulated" facts are meaningless in and of themselves. An intelligent appreciation of the significance of those facts requires resort to the record in its entirety, and the remainder of the telephone conversation in which these "revelations" were made. Because counsel for Respondents controverted the full description of the post trial conversation, and because the Court of Appeals ignored all facts in or out of the record other than those favoring Respondents' position in determining materiality, unresolved questions of fact existed.

III. The "right to know" analysis followed by the Tenth Circuit and favored by respondent is unconstitutional and unworkable.

Respondents' brief on the merits supports the position of the Tenth Circuit Court of Appeals concerning the irrelevancy of any determination of actual bias, where a litigant claims to have been deprived of the right to exercise peremptory challenges. Respondents suggests that actual bias and good faith should be ignored, in favor of an abstract analysis of the information that could have been

obtained during some hypothetical voir dire examination. The position of Respondent ignores the most elementary principles of due process and exalts formalities over facts. The analysis of Respondent expressly rejects the harmless error rule of F.R.C.P. 61 and 28 U.S.C. Section 2111.

Respondent's analysis rests upon the contention that there exists some abstract "right to know" what goes on inside the mind of a jury panelist. This "right to know" is described in terms which conveniently ignore the issue of "how to find" this elusive information. Opposing counsel admit that the information sought is evidence of *unconscious* or *unacknowledged* bias. It is even suggested that interrogation of the suspect juror on remand would be fruitless, since a biased juror would not reveal his or her attitude during interrogation. This argument of course proves too much. If the mental state which counsel seeks to discover cannot be revealed during examination under oath, how then is it to be discovered? Perhaps a resort to supernatural practices is to be suggested?

The contention that "unconscious bias" warrants a presumption of error in cases such as this has been rejected by this Court and by all circuits other than the Tenth. Only last year in *Smith v. Phillips*, 455 U. S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982), the efficacy of post trial examination of potentially biased jurors was acknowledged:

> We may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter. 455 U. S. at 217, Footnote 7.

An honest and truthful juror can reveal as much in a post trial hearing as he possibly could reveal during voir dire examination. Thus there should be no difficulty in presenting on remand a full and complete picture of everything that juror Payton could have revealed during voir dire examination.

Respondents contend that the difficulty of proving unconscious bias through examination of jurors warrants the imposition of a presumption in favor of the party seeking a new trial on that basis. This is admittedly the rational conclusion to be drawn once a "right to know" is established. The significance of the argument is that it disproves the premise, not that it supports the conclusion that presumptive bias should be inferred. Because the harmless error rule prohibits a presumption of reversible error, the premise of an abstract right to know must be rejected.

28 U. S. C. Section 1870 does not guarantee knowledge to counsel for litigants. It guarantees the right to exercise peremptory challenges. These challenges are to be exercised on the basis of whatever information counsel possesses. The Court may, in its discretion, grant counsel the right to inquire before peremptory challenges are exercised under F.R.C.P. 47. Counsel does not have a right to know, or even a right to inquire, but only a right to hear the responses made during voir dire examination. If the information which counsel desires to know is, by definition, the presence or absence of an unconscious or unacknowledged bias, that information simply cannot be revealed during the jury selection process. All that can be obtained from the jury panel during voir dire are honest,

good faith answers to voir dire questions as the panel members understand those questions.

It is one thing to assert a right to rely upon the honesty of the answers given during voir dire. It is a wholly different matter to allege a right to know things that a prospective juror is incapable of stating. If some objective fact about the panel member is indicative of bias, but is unknown to him or her, that information must be learned outside the courtroom. If such information is available, it is available before the exercise of peremptory challenges, and not solely after the rendition of an adverse verdict. Certainly the judicial system cannot guarantee to litigants information which is inaccessible to the trial participants.

The meaninglessness of a so-called "right to know" is best illustrated by inquiring of the method by which the District Court in this case would guarantee such a right, if Respondents are successful in obtaining a new trial. Is voir dire to be conducted in some different manner? Are jurors to be subjected to polygraph examination? Are the services of private investigators to be utilized by the parties? No matter what procedure is used, the only information that can be obtained *from the jury panel* will be honest good faith answers to those questions which are in fact asked.

Neither opposing counsel nor the Court of Appeals contended that juror Payton's answer to the question actually asked of him was material in and of itself. Payton was asked only to reveal whether any member of his family had suffered a disabling injury, or an injury that resulted in prolonged pain and suffering. All parties acknowledged that a "yes" answer to that question is not in

and of itself material. Jurors Cook and Finnigan both answered the question in the affirmative, and no suggestion has been made that their answers were material to the exercise of peremptory challenges. The information which counsel claims to have required was the answer to another, wholly different question asked during a post trial telephone conversation. The substance of that question has been lost forever due to lapse of memory. This question was undoubtedly one which could have been asked by counsel before exercising peremptory challenges, but was not.

The so-called "right to know" espoused by Respondents and the Tenth Circuit amounts simply to this: unsuccessful litigants are to be given the opportunity to show that voir dire examination could have been conducted more thoroughly, and that some additional information which might conceivably have been significant to counsel would have been elicited, if a more thorough voir dire examination had been conducted. Where counsel for the unsuccessful litigant can show that his voir dire examination was inadequate, his client is guaranteed a new trial. Under this rule intelligent counsel would ask only a single question. The jury panel would be requested to volunteer all information which might conceivably be pertinent to an assessment of their possible unconscious bias. Any information not volunteered by a jury panelist could then be discovered post trial through ordinary voir dire. This procedure of course makes a mockery of the jury trial system, but it does uphold the contended "right to know".

Counsel knew everything that he was entitled to know when peremptory challenges were exercised. Counsel knew the honest good faith answers of every member of the jury panel. If additional information was not revealed, it was

solely due to counsel's failure to inquire. Juror Payton was prepared to reveal during voir dire everything which he revealed during the post trial interview. Assuming that the information revealed in that interview was material, it was available for the asking during the jury selection process. The only fact about juror Payton learned from some source other than Payton himself was the fact of his son's injury. Even this fact was readily admitted by him when he was asked a simple question. This "unrevealed" fact is admitted by all parties to be immaterial in and of itself. Its significance lies solely in its tendency to invite further inquiry. As described in great detail in Petitioner's brief on the merits, counsel for Respondents was already on notice that further inquiry was needed on the topic of juror Payton's attitude toward personal injury, pain, and suffering due to his long time employment in a slaughter house.

The "right to know" can mean nothing more than a right to inquire. Counsel was not deprived of his right to inquire. Even the Court of Appeals acknowledged that counsel received all of the information which could be provided through a good faith response to inquiry. Supposition of a right to know more than can be revealed during this process implies an unwarranted and unworkable privilege to attack otherwise proper and fair jury verdicts during post trial proceedings.

IV. Respondents' suggestion that the case be remanded to the Court of Appeals should be rejected.

A review of Respondents' brief on the merits indicates no suggestion or hint that the question of juror misconduct should be submitted in a hearing wherein both parties have

an opportunity to present evidence and argument. Respondents are plainly upset at the suggestion that the District Court be allowed to find any facts in this case, and appear to be similarly displeased by a suggestion that a factual determination be made on the basis of all of the evidence currently in the record, even if that were to include all information suggested to the Court of Appeals. Respondent would have this Court affirm the decision of the Court of Appeals and thereby affirm that Court's denial of a right to a hearing, or remand this case to the Court of Appeals for a rehearing on issues other than juror misconduct, but in no event for a determination of the juror misconduct issue on the basis of a full hearing.

If there really were any merit to Respondents' position, there would not be so much hesitation to permit juror Payton to speak his mind fully and openly on the record. Respondents are pleased to be able to complain that such a hearing did not take place, but openly prefer that any information which might be obtained during such a hearing be ignored. Respondents' position on the question of remand can therefore only be construed to support Petitioner's contention that no facts exist to form the basis for a new trial.

None of the other circuit courts of appeal have any difficulty in assessing the merits of a complaint about irregular jury selection procedures by way of an evidentiary hearing. Every other circuit provides both litigants an opportunity to present facts and argument before the tribunal which is most familiar with the nature of the case and the issues presented. The Tenth Circuit Court of Appeals openly espouses a different substantive rule from that followed in other circuits, by reducing the issues of

bias and prejudice to the concept of "materiality". Under any rule the Court's determination that a substantial right has been impaired must be based upon facts rather than upon speculation. If any fact is material to that determination, Petitioner was entitled to a hearing on that subject. If there were no facts to be determined, then the rule followed by the Tenth Circuit must by definition be arbitrary and capricious.

No hearing is in fact required because the burden of proof was on Respondents to submit facts and arguments supporting a contention that the District Court abused its discretion in denying a new trial. While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the results set aside, and that it be sustained not as a matter of speculation but as demonstrable realty". See *Beck v. Washington*, 369 U. S. 541, 558, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962). No facts were presented either at the District Court level or to the Court of Appeals to support a contention of bias. Because those supportive facts do not appear in the record, Petitioner is entitled to an affirmance of the judgment in its favor. If the unsupported contentions presented to the Tenth Circuit are deemed by this Court to have raised a factual inference, the only proper course of conduct is that followed in every other circuit. The case should be remanded to the District Court for a full fact hearing and a determination of either "materiality" or bias and prejudice as the case may be.

There is no need to consider any issue presented to the Court of Appeals but rejected by that Court. In the

last two pages of their brief on the merits Respondents suggest that this case should be remanded to the Court of Appeals to permit the redrafting of that Court's opinion. It is suggested that the Tenth Circuit should achieve its goal of arbitrarily granting a new trial by issuing an opinion with less impeachable rationalizations. If there had been any merit to the other issues presented to the Court of Appeals, the Court of Appeals would have commented upon them. The other issues involved alleged errors which were subject to repetition upon retrial. If these issues had been considered meritorious the District Court undoubtedly would have been given instructions to revise its rulings upon retrial. Since no instructions were given to the District Court concerning the alleged trial errors, it can only be presumed that these issues were found by the Court of Appeals to lack merit.

This is not a case where a significant issue has been raised for the first time on certiorari, or where the Court of Appeals has failed to consider significant issues due to an erroneous resolution of the questions presented on certiorari. The case of *Aetna Casualty and Surety Co. v. Flowers,* 330 U. S. 464, 91 L. Ed. 1024, 67 S. Ct. 798 (1946), is therefore inapposite. The additional grounds for the granting of a new trial presented to the Court of Appeals can be resolved by this Court on the record before it without remand.

V. CONCLUSION

For all of the above stated reasons the judgment of the U. S. Court of Appeals for the Tenth Circuit should

be reversed, and judgment should be entered in favor of Petitioner. No remand is necessary because the burden of proof placed on Respondents to adduce evidence of juror misconduct resulting in prejudice to a substantial right has not been met. If the unrecorded comments related to the Court of Appeals are held to form a sufficient basis to raise an inference of bias or prejudice, Petitioner is entitled to a remand for a full factual hearing before the District Court on those questions. Any remand should be to the District Court for factual findings relating to alleged juror misconduct. Under no circumstances would a remand to the Court of Appeals for reconsideration of issues previously rejected by that Court be proper.

Respectfully submitted,

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